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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936. No. 638.

HIRAM STEELMAN, Trustee in Bankruptcy of WILLIAM FOX, a Bankrupt,

Petitioner,

vs.

ALL CONTINENT CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITIONER'S REPLY BRIEF

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THE ISSUES

The first issue is:

Does a bankruptcy court *ever* have *power* to enjoin litigation of a controversy involving property *not* in its actual or constructive possession?

It is conceded that if such power exists it was properly exercised on the present record (Respondent's brief, pp. 2, 3).

There are three cogent reasons for the exercise by the bankruptcy court in this case of its admitted "power to issue

an injunction when necessary to prevent the defeat or impairment of its jurisdiction."[1] These reasons are:

(1) The record in this case shows that both the bankrupt and All Continent have themselves submitted to the bankruptcy court the issue as to whether All Continent is the *alter ego* of the bankrupt,—the bankrupt, by scheduling All Continent as a creditor to the extent of $417,258.19 (R. 44, 79), and All Continent, by filing a proof of claim (R. 8, 15). The mere pendency of the subsequently commenced Pennsylvania suit shows the supervening attempt in the name of All Continent to embarrass and frustrate the bankruptcy court in an orderly adjudication of this issue.

(2) The record in this case makes it clear that the trustee, with only $100 of liquid assets (R. 8, 15), can ill afford either a duplicate or a distant litigation of the controversy between him and All Continent. If the trustee be required to defend the Pennsylvania suit on the merits, he will necessarily be forced to spend money he does not have and to neglect his duties in the administration of the estate. His time, and money (if he had any), would be spent in giving attention to a litigation in a foreign jurisdiction, in which the bankruptcy court has found (R. 29-30, 32), and respondent has conceded (Brief, pp. 1-3), the trustee was *improperly* made a party.[2]

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[1]Compare Respondent's Brief, p. 31. Quotation from *Continental Illinois National Bank & Trust Company* v. *Chicago, Rock Island & Pacific Ry. Co.*, 294 U. S. 648, 675.

[2]The concession by respondent occurs in its acceptance, as the "question presented", of a question expressed upon the assumption that the trustee was improperly made a party to the Pennsylvania suit. Respondent could not well have done

(3) The Pennsylvania suit obviously presents questions on which the trustee will be unprepared to go to trial in any jurisdiction (even though able to prepare a pleading relating thereto) without a full and complete investigation of the facts in Section 21(a) examinations in the bankruptcy court. It is no answer to say that the trustee stands in the shoes of the bankrupt. He may succeed to the bankrupt's rights and liabilities vis-a-vis third parties. But he does not succeed to the bankrupt's knowledge. Until he has acquired that from the bankrupt through Section 21(a) proceedings, he is at an impossible disadvantage in litigation against such third parties. It is not fitting, therefore, that the purpose of Section 21(a) examinations should be frustrated by allowing the witness (here, All Continent) to take his controversy to a foreign jurisdiction for premature[3] litigation against an impecunious and uninformed trustee.

No attempt has been made by petitioner to uphold the injunctive power of the bankruptcy court on the ground

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otherwise, as the trustee clearly *was* an improper party to the Pennsylvania suit. That suit shows nothing more than verbal assertions by the trustee that whatever "cloud" Capital Company had created should be continued in *statu quo* (R. 21, 22). A bill in equity will not lie to dispel mere verbal assertions. *Devine* v. *Los Angeles*, 202 U. S. 313, 334; *Richardson* v. *Pennsylvania Coal Co.*, 203 Fed. 743 (D. C. M. D. Pa. 1913); 78 A. L. R. 24, 40-43.

[3]Respondent's argument of necessity is specious. The District Court for the Southern District of New York, out of which the subpoena issued, could, and undoubtedly would, upon a proper application, permit sales out of the account and the retention of the proceeds by Sparks & Company, or permit transactions in the regular and ordinary course of business, provided that the fund impounded by the service of the subpoena remained intact, though it changed in form, through such sales.

that the property of All Continent Corporation is in the *possession* of that court. The argument is that the bankruptcy court has power to enjoin an attempt by an adverse claimant to litigate issues with the trustee in a foreign jurisdiction, where (1) such issues have already been presented to the bankruptcy court by the adverse claimant and will necessarily be litigated there regardless of the foreign suit; (2) the circumstances indicate that in defending the foreign suit the trustee will be subjected to inconvenience amounting to a practical denial of his day in court; (3) the trustee is not a proper party to the foreign suit; and (4) the purpose of Section 21(a) examinations will be frustrated by forcing the trustee into a foreign trial without the information needed to defend. The argument is that the power exists in such cases regardless of whether the property involved is in the possession of the bankruptcy court or in the possession of the adverse claimant; that this is especially true where the bankrupt is "Dr. Jekyll" and the adverse claimant bears an exceedingly strong resemblance to "Mr. Hyde".

The second issue, presented by the *opinion* of the Circuit Court of Appeals, which respondent (for obvious reasons) expresses a desire to omit from discussion, is whether, by the utterance of eleven prejudicial dicta, the Circuit Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings and has so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."[4]

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[4]**Reason No. 2 for granting the writ, as stated in the petition for certiorari, page 10.**

POINT I.

RESPONDENT'S CASES DO NOT SUPPORT, AND PETITIONER'S CASES DEFINITELY REFUTE, THE THEORY THAT THE INJUNCTIVE POWER OF THE BANKRUPTCY COURT IS LIMITED TO RESTRAINTS AFFECTING PROPERTY IN THE POSSESSION OF THE BANKRUPTCY COURT.

In none of the cases set forth in Point I of respondent's brief did the court decide that a bankruptcy court did not have jurisdiction to enjoin an attempted predetermination of an issue involved in a claim theretofore submitted to the bankruptcy court. In none of them was it decided that the bankruptcy court was powerless to enjoin a creditor from harassing the trustee by premature, extremely inconvenient, and perhaps useless,[5] litigation in a foreign jurisdiction. In none of them was it held that the bankruptcy court lacked power to protect the trustee from the necessity of defending litigation while he was still actively engaged in investigation—including examination of the very adverse claimant who had instituted the litigation. In none of them did the court refuse to enjoin prosecution against the trustee of a suit in which he was improperly joined. In none of them did the court suggest that the bankruptcy court lacked

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[5]Respondent assumes, as part of its argument, that a fraudulent transferee may, under the guise of invoking Section 57 of the Judicial Code, force a creditor or a trustee in bankruptcy to litigate whether the transfer was in fact in fraud of creditors. No case goes so far. A mere adjudication that the fraudulent transferee had legal title, which must be assumed in any action to set aside the conveyance, would be a waste of time and money which ultimately belongs to the bankrupt estate.

power to enjoin the bankrupt from doing through his apparent *alter ego* what he could not do in his own name.

In several of the cases cited by respondent there is language to the effect that the bankruptcy court has power to enjoin an outside litigation only where the property is in the custody of the bankruptcy court. Each of such cases, however, falls into one or more of several classes clearly distinguishable from the instant case, and in each the language goes far beyond the facts (incidentally affording a good illustration of the dangers of dicta such as those uttered by the Circuit Court of Appeals in the present case):

CLASS I—*Where the only possible basis for exercise by the bankruptcy court of jurisdiction to issue an injunction was a claim that the property in question was in the possession of the bankruptcy court, and that question being decided adversely to the trustee the case was disposed of.*

The case of *Fort Dearborn Trust & Savings Bank* v. *Smalley*, 298 Fed. 45 (C. C. A. 8th, 1924), cited and discussed on pages 22-26 of respondent's brief, is a typical illustration of this. In that case a controversy as to the title of property, which had at one time belonged to the bankrupt, but had been transferred by him, had been presented to the State Court by a suit instituted by the transferee prior to the filing of the petition in bankruptcy. The trustee contended that the property was still in the possession of the bankrupt when the petition was filed and, therefore, in the custody of the bankruptcy court. On the basis of this argument, an injunction restraining certain proceedings in the suit instituted prior to bankruptcy was sought in the bankruptcy court. The Circuit

Court of Appeals determined the issue as to possession adversely to the trustee, and, since no issue involved in the State Court action had been presented in the bankruptcy court (since indeed there was no bankruptcy) at the time of the institution of the suit in the State Court, and since none of the other factors, here relied on as a basis for jurisdiction, was present, it was properly held that the bankruptcy court had no power to issue the injunction requested. The court properly said that, in the circumstances presented by *that* case, the only basis for exercise of an injunctive power by the bankruptcy court was the claim that the property was in the custody of the court and, that basis being removed, no injunction could be granted.

CLASS II—*Where there was no investigation pending in, and had been no prior submission to, the bankruptcy court of any issue presented by the litigation sought to be enjoined, either (a) because that litigation was commenced before the institution of bankruptcy proceedings, or (b) because the issue was not involved in the bankruptcy.*

The *Fort Dearborn* case, discussed as an illustration of Class I, is also distinguishable as a Type (a) case under Class II.

An additional example of Type (a) is *Molina* v. *Murphy*, 71 F. (2d) 605 (C. C. A. 1st, 1934) [Respondent's Brief, p. 26], in which the court refused an injunction restraining a foreclosure sale in a suit against one who filed a petition for composition under § 74 of the Bankruptcy Act after the foreclosure proceedings had been carried almost to a conclusion.

An example of Type (b) is *In re Adolf Gobel, Inc.*, 80 F. (2d) 849 (C. C. A. 2d, 1936) [Respondent's Brief, p. 27], in which the suit sought to be enjoined was for damages

against a solvent corporation in no way involved in the bankruptcy, except that its common stock (but not its preferred stock or bonds) was admittedly owned by the bankrupt. It was not suggested that the issues presented by this action had been, or could be, presented in the bankruptcy court.

Petition of Schwartz, 7 F. (2d) 79 (C. C. A. 1st, 1925) [Respondent's Brief, p. 27], likewise involved a simple suit for damages against attaching creditors and a sheriff. No question involved in the suit was presented in the bankruptcy proceedings and consequently no injunction was granted. Furthermore, the suit sought to be enjoined there was not an actual suit but merely a threatened suit.

Similarly, *In re Grissler,* 136 Fed. 754 (C. C. A. 2d, 1905) [Respondent's Brief, pp. 29-30], involved a mechanic's lien foreclosure action in which the trustee's only interest was that the bankrupt was a lienor. No question as to his status was presented in the bankruptcy proceedings, nor did it appear that any such question could be there presented.

To the same effect, where the notice of lien was filed prior to bankruptcy, is *In re Barber,* 7 F. Supp. 806 (S. D. N. Y. 1934) [Respondent's Brief, p. 30].

It may also be noted that in the *Grissler* case the trustee voluntarily appeared in the foreclosure action.

Indeed, each of respondent's six cases considered under Class II appears to be distinguishable under Class I as well.

CLASS III—*Where the trustee was sued for conversion following a sale of property adversely claimed.*

Cases like *In re French,* 18 F. (2d) 792 (W. D. Mich., S. D., 1927) [Respondent's Brief, pp. 27-28], and *In re*

J. M. Mertens & Co., 147 Fed. 182 (C. C. A. 2nd, 1906) [Respondent's Brief, p. 30], are trover and conversion cases, which merely illustrate the familiar principle that the trustee will not be protected by injunction in the commission of a tort. Such action by the trustee obviously does not represent "orderly administration of the bankruptcy proceedings".

CLASS IV—*Where the power of the bankruptcy court to issue an injunction was not involved.*

Heath v. *Shaffer*, 93 Fed. 647 (N. D. Iowa, E. D. 1899) [Respondent's Brief, p. 28], did not even involve an application to the bankruptcy court. The trustee there sought his injunction by a bill in equity in the Federal court. Furthermore, the court in that case expressly refused to pass upon its jurisdiction, holding merely that a sufficient showing for a preliminary injunction had not been made out.

In re John Condon Contracting Co., Inc., 1 F. Supp. 447, modified on reargument in 2 F. Supp. 52 (E. D. N. Y. 1932) [Respondent's Brief, p. 30], did not involve an application for an injunction. In that case the application was by a co-defendant of the bankrupt in a mechanic's lien foreclosure action for leave of the bankruptcy court to bring in the trustee as a party defendant. The liens were against a public improvement and it appeared that there was a fund of $42,000 available for payment to lienors, a substantial part of which the trustee in bankruptcy was confident would be available to him for distribution to general creditors. The Court allowed the joinder of the trustee but on the express condition that the suit be prosecuted "in a forum which is convenient to the trustee,

namely, Kings County," stating that it "would not be practicable" for the trustee to be forced to defend the case in another county of the same state, to wit, Albany County, since the trustee asserted that he was "without funds to enable him to conduct litigation in Albany County." In so far as this case is authority for anything relevant to the present proceeding, it is submitted that it sustains the view of the New Jersey Bankruptcy Court that petitioner, with his $100 of liquid assets, should not be burdened with the defense of a useless litigation in a foreign jurisdiction.

All of the cases above distinguished as being within one or more of the four classes described were lower Federal court cases. None of them ever came before this Court. Indeed, respondent has cited only one case in subdivision 2 of POINT I which was decided by this Court: *Hebert* v. *Crawford,* 228 U. S. 204. That case is distinguishable under each of the first three classes. The State Court suit there sought to be enjoined was brought by a third party to recover a sum of money from a substituted trustee in bankruptcy, which money had been paid to such substituted trustee by the original trustee after having been abstracted by the latter from the treasury of the plaintiff third-party. The sole question presented was whether the substituted trustee had notice, when he received the money, as to its source. The other controversy presented by the *Hebert* case,—as to the title and right of possession to a certain crop of rice—was determined by the bankruptcy court without interference by the State Court and was admittedly not involved in the State Court action sought to be enjoined. No question properly before the bankruptcy court was involved in that State Court action; and while this Court clearly recognized the power of the bankruptcy court to

enjoin interferences with its jurisdiction to determine questions of title to property in its possession, this Court did not there pass upon the question whether such power extends to other situations. It was not called upon to do so by the facts of that case.

Two other cases cited by respondent (in Point III of its brief) require brief comment:

Daniel v. *Guaranty Trust Co.*, 285 U. S. 154, 162 [Respondent's Brief, p. 45] is cited for the proposition that:

> "The act of filing a claim in a bankruptcy court does not give that court jurisdiction over the claimant as to every issue that might possibly arise between claimant and trustee in bankruptcy."

In that case, however, when Guaranty Trust Company filed a reclamation petition as to certain bonds in the possession of the trustee, the trustee filed a counterclaim for moneys allegedly owed by the Trust Company to the bankrupt, such alleged debt apparently having no relation to the subject-matter of the reclamation petition. This Court held that the filing of the reclamation petition did not confer on the referee summary jurisdiction to enter a turnover order against the Trust Company on the debt set up by the trustee in his counterclaim, since that was a matter "having no immediate relation to the claim which it [the Trust Company] had presented" [285 U. S., at 162]. In the instant case, the trustee has not attempted to assert any summary jurisdiction in the bankruptcy court over his affirmative claim to recover the assets of All Continent; but nothing could be a more complete defense to the claim of $417,258.19, filed by All Continent in the bankruptcy court, than the trustee's contention that All Continent is the

alter ego of the bankrupt. No matter could have a more "immediate relation to the claim * * * presented."

The discussion at pages 39-40 of Respondent's Brief indicates that *Southwestern Lumber Co. of New Jersey* v. *Kerr,* 11 F. Supp. 253 (S. D. Tex., 1934), aff'd in 78 F. (2d) 348 (C. C. A. 5th, 1935), might have some relevance to the problem of the present case. An examination of that case, however, indicates that the trustee did not press his objection to the jurisdiction of the equity court but filed a cross-action there and litigated the question on the merits, at the same time taking no proceedings in the bankruptcy court. Respondent quotes the following sentence from page 259 of the District Court's opinion:

> "The foregoing discussion is upon the finding and conclusion that the bankruptcy court and defendant, its trustee, have *neither actual nor constructive possession of the stock.* * * *"

Respondent then quotes the Court's conclusion in the following paragraph that it, and not the bankruptcy court,[6] has jurisdiction to consider the controversy, but omits the intervening sentence which explains why:

> "If it has either [*i.e.,* actual or constructive possession], the bankruptcy court, and not this court, has jurisdiction, unless defendant, by his long delay in proceeding in the bankruptcy court, and by filing his cross-action here, has waived it. * * *"

Nowhere does the Court suggest that the bankruptcy court lacks jurisdiction to enjoin proceedings by adverse

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[6]**The opinion shows (p. 255) that the bankruptcy was pending in the same District Court and the only question, therefore, was whether the same court should hear the case sitting in equity or sitting in bankruptcy.**

claimants in foreign jurisdictions where any of the reasons for such an injunction urged by the petitioner in the present case appear. Indeed, from the next preceding opinion by the same judge in the same case (11 F. Supp. 252), a decision handed down eight months before the decision relied on by respondent, it appears that the court did restrain the adverse claimant, on motion of the trustee, from selling the pledged securities pending a determination of the merits of the controversy, which both the adverse claimant and the trustee thereafter submitted to the equity court. That the jurisdictional question was not pressed is further indicated by the fact that it is not even discussed in the opinion of the Circuit Court of Appeals (78 F. (2d) 348), which was limited to a discussion of the merits of the controversy.

Turning now to petitioner's cases:

If the sole question is one of power, as respondent in the first instance concedes (Brief pp. 2-3), the only authorities needed to sustain petitioner's position are the applicable sections of the Bankruptcy Act and the Judicial Code, cited in petitioner's original brief (pp. 17-18, 20), and the decisions of this Court in *Continental Illinois National Bank & Trust Company* v. *Chicago, Rock Island & Pacific Ry. Co.*, 294 U. S. 648, and *Local Loan Co.* v. *Hunt*, 292 U. S. 234, together with the cases in the lower Federal Courts discussed at pages 24-25 of petitioner's original brief. All of these authorities deal with the Bankruptcy Court's power to enjoin the exercise of the rights of adverse claimants.

As for respondent's criticisms of the *Rock Island* case (Respondent's Brief, p. 32):

(a) That case did arise, as petitioner carefully stated in his original brief (p, 18), under Section 77 of the Bank-

ruptcy Act; but this Court found the authority for its injunction in the so-called "omnibus" clause (15) of Section 2 (294 U. S. at 677-678). The obvious and appropriate purpose of this Court's limitation of its decision to cases under Section 77 was to serve notice that this Court did not intend to impair the long-settled rule that a bankruptcy court lacks power to enjoin *pledgees* in ordinary bankruptcies. No limitation upon the broad and general injunctive power of bankruptcy courts, so thoroughly expounded in the *Rock Island* opinion, was expressed, and no such limitation, it is submitted, was intended.

(b) By removing certain language of the opinion from its context, respondent suggests (Brief p. 32) that the *Rock Island* case did not involve an adverse claimant; but it unquestionably did involve a pledgee in possession of pledged securities. The courts have consistently regarded a pledgee in possession as an adverse claimant. See, for example:

In re Bacon, 210 Fed. 129 (C. C. A. 2d, 1913).

In other words, whatever phrase is used to describe the status of the pledgees in the *Rock Island* case, that status was in all respects similar to that of the respondent herein, —they were claimants in possession of property in which the creditors (trustee in our case) claimed an interest, and were attempting to exercise their rights with respect thereto by action outside the Bankruptcy Court. The Court there enjoined that action. The same result is sought here.

(c) By the statement that the debtor had a "property interest" in the pledged securities, respondent apparently

asks this Court to infer that the decision in the *Rock Island* case was based upon the existence of summary jurisdiction in the Bankruptcy Court. The creditors, however, were adverse claimants in possession within the meaning of prior cases, and, therefore, even under Section 77, the Bankruptcy Court had no *summary* jurisdiction. Yet without summary jurisdiction, the Bankruptcy Court had, and exercised, its power to enjoin the pledgees.

If respondent seeks to avoid the force of *Local Loan Co.* v. *Hunt*, 292 U. S. 234, on the ground that the injunction there involved was not issued by a bankruptcy court as such, he must ignore the plain words of the decision itself. In that case this Court said (292 U. S. at p. 241):

> "What has now been said establishes the authority of the bankruptcy court to entertain the present proceeding, determine the effect of the adjudication and order, and enjoin petitioner from its threatened interference therewith."

Respondent's other attempts to distinguish this Court's decision in the *Hunt* case, *supra*, illustrate the very point petitioner urges. There the bankruptcy court had exercised its function and had granted the bankrupt a discharge. The Court's duties had, under ordinary circumstances, been fulfilled and there remained nothing further for it to do. But a situation arose in which "one of the primary purposes of the bankruptcy act" was threatened with being frustrated by the conduct of third persons (292 U. S. at pp. 244, 245). This Court held that the danger, in effect, created the remedy. Like any court of equity, the bankruptcy court was held to have power "to secure or pre-

serve the fruits and advantages of a judgment or decree rendered therein" (292 U. S. at p. 239). If a "judgment or decree" is necessary to establish and maintain the applicability of the *Hunt* case, the decree of adjudication and the orders of the referee are ready to hand. Such, however, need not be relied upon, for the power which this Court found to reside in the bankruptcy court was clearly as broad as the exigencies of the situation required.

In the case now before this Court, interference is clear. It is alleged in the petition upon which the injunction was granted (R. p. 8):

> "16. By means of the institution of its said suit in said Eastern District of Pennsylvania, said All Continent Corporation is endeavoring to hinder, impede, harass, obstruct and prevent the orderly, proper and legal administration of the affairs of this bankrupt estate * * *."

This was not then and is not now controverted by respondent (R. 28-29; Respondent's Brief, pp. 2-3); was found to be the fact by the bankruptcy court (R. 31, 32); was the basis of the injunction which issued (R. 31-32); and is now claimed by respondent to be immaterial (Respondent's Brief, pp. 2-3).

At pages 24-25 of petitioner's original brief, the following cases were discussed:

> *In re Trayna & Cohn,* 195 Fed. 486 (C. C. A. 2d, 1912);
> *In re Perl,* 28 F. (2d) 1002 (W. D. Pa., 1928);
> *In re Hornstein,* 122 Fed. 266 (N. D. N. Y., 1903);

In re Nathan Turim, Inc., 55 F. (2d) 672 (S. D. N. Y., 1931); and
In re Republic Plumbing Supply Corporation, 295 Fed. 573 (E. D. N. Y., 1924).

These cases were cited for the proposition that "the lower courts have often enjoined collateral litigation of bankruptcy controversies outside of the bankruptcy courts, and under a variety of different circumstances." They were cited as applications of the principle enunciated by this Court in *Local Loan Co.* v. *Hunt*, 292 U. S. 234, that a bankruptcy court has power to enjoin external litigations which tend to frustrate the purpose of the Bankruptcy Act. Yet, respondent passes over all of these cases, except *In re Trayna & Cohn*, with the statement that none "involved the question of the bankruptcy court's power to enjoin a suit against a trustee * * *" [Brief, p. 35]. But, each involved a situation in which a question presented to the bankruptcy court in one form or another, relating to property not in the possession of the bankruptcy court, was thereafter presented by a collateral litigation instituted by an adverse claimant, and in each case such adverse claimant was enjoined by the bankruptcy court from further prosecuting such collateral litigation. No better evidence of the applicability of these precedents to the instant case could be sought than respondent's counsel's failure to attempt a distinction in their extremely thorough brief.

A more courageous, but equally futile, effort is made [Respondent's brief, p. 35] to distinguish *In re Trayna & Cohen*. The distinction urged is that in that case the plaintiff in the State Court action had consented to a consideration of title by the bankruptcy court before he attempted to raise the same question in the State Court action. This

attempted distinction further emphasizes the weakness of respondent's position, for it is equally clear in the present case that respondent consented to a consideration by the bankruptcy court of all questions raised by its proof of claim, which it filed before the institution of the Pennsylvania suit (R. 8, 15, 31, 44). There certainly can be no doubt that one of the questions presented by that proof of claim was whether respondent is the *alter ego* of the bankrupt.

POINT II.

THE *DICTA* OF THE CIRCUIT COURT OF APPEALS ARE PROPERLY SUBJECT TO REVIEW IN THIS COURT, QUESTIONS RESPECTING THEM HAVING BEEN PRESENTED BY THE PETITION FOR THE WRIT OF CERTIORARI.

The petition in the present case contained "a summary and short statement of the matter involved" (pp. 2-7) in which one paragraph was devoted to the decision of the Circuit Court of Appeals and one paragraph to the *dicta* of that court. Those paragraphs are set forth at pages 6-7 of the petition. The petition also contained "a short and summary statement of * * * the reasons relied upon for the allowance of the writ"[7] (pp. 8-13). One of the reasons urged for the granting of the writ was that the action of the Circuit Court of Appeals, in prejudging, by *dicta*, questions

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[7]The only requirement of the rules as to the mode of stating the questions in the petition is found in the first sentence of § 2 of General Rule XXXVIII:

> "2. The petition shall contain only a summary and short statement of the matter involved and the reasons relied on for the allowance for the writ."

not before the court, "has so far departed from the accepted and usual course of judicial proceedings and has so far sanctioned such a departure by a lower court as to call for an exercise of this Court's power of supervision" (pp. 10-13).

Furthermore, there is no jurisdictional limitation which prevents this Court from considering questions presented by the record, even if not raised by the petition for certiorari, where a decision of the Circuit Court of Appeals is the subject of review.[8] *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555, 567-568. *A fortiori*, matters urged in the petition as reasons for granting the writ may be considered, though not stated in an unnecessary part of the petition headed "Questions Presented". *Cf. Olson* v. *United States*, 292 U. S. 246, 262.

Neither the case quoted by respondent (*Helvering* v. *Taylor*, 293 U. S. 507, Brief pp. 18, 57), nor the authority cited in that quotation (*Gunning* v. *Cooley*, 281 U. S. 90), is authority for the petitioner's argument (Brief, pp. 18, 57) that "no consideration should be given to petitioner's Point III." In the *Helvering* case the petitioner stated a broad "question". The respondent argued (see pp. 6-7, 26-27 of his brief) that the petitioner had stated the question unfairly, by making assumptions not supported by the record and unfavorable to respondent. This Court decided that, even accepting petitioner's statement of the question, and the disputed facts incorporated therein, as correct, the petitioner could not prevail. In the *Gunning* case peti-

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[8]A collection of certiorari cases in which this Court has considered questions not raised in the petition is found in *Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States* (1936), § 389, pp. 782-787.

tioner was a physician against whom a verdict for malpractice had been rendered. The petition and supporting brief discussed solely the insufficiency of respondent's proof and alleged error in the trial court's refusal to direct a verdict for petitioner. In petitioner's main brief (pp. 9-12), however, there were sixteen assignments of error, of which eleven related to irregularities in the conduct of the trial not mentioned anywhere in the petition or supporting brief. Such matters this Court properly declined to pass upon.

POINT III.

PETITIONER'S POINTS ARE ADEQUATELY SUPPORTED BY *THIS* RECORD. THE RECORD IN *MATTER OF STEELMAN* IS ESSENTIALLY CORROBORATIVE.

This record shows that All Continent filed its claim in the bankruptcy court (R. 8, 15); that All Continent was scheduled by the bankrupt as a creditor in the bankruptcy court in the sum of $417,258.19 (R. 44, 79); that the trustee has asserted in most unequivocal language that All Continent is the *alter ego* of the bankrupt (R. 45-47, 81-83); that examinations under Section 21(a) of the Bankruptcy Act are and have been pending in which the trustee is investigating the relationship of All Continent to the bankrupt (R. 3, 10, 67); that such examination has been obstructed by All Continent itself (R. 5-6, 12-13); that such examination has further been obstructed by the wife of the bankrupt, herself President of All Continent (R. 3, 6, 10, 13); that the trustee is financially unable to defend the lawsuit instituted in Pennsylvania (R. 8, 15, 79-80).

The only facts mentioned in petitioner's brief which are found *only* in the *Matter of Steelman* record are (a) that a creditor, Capital Company, objected to the All Continent claim on the same grounds which, it appears from this record, the trustee has urged; and (b) that the bookkeeper of All Continent Corporation, Herbert Leitstein, has been cited to the bankruptcy court for contempt of court, upon which citation the bankruptcy court has not yet ruled.

Respectfully submitted,

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